88-97

No. .....

In the Supreme Court
OF THE
United States

October Term, 1988

FORD MOTOR COMPANY
Petitioner,

vs.

GARY BRYANT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a state pleading practice permitting a plaintiff to name allegedly unknown defendants charged with no actionable conduct foreclose the right of removal based on diversity of citizenship under federal law?

2. In state cases that include fictitious Doe defendants, does the 30 days within which a case must be removed, 28 U.S.C. § 1466(b), commence only after the plaintiff drops the Does or the trial commences without service of the Does even though the statute provides, that removability may appear through "receipt of an amended pleading, motion, order or other paper?" *Id.*

3. Where a state case that includes unserved fictitious Doe defendants is removed without challenge, and the District Court disregards the Does (no formal order of dismissal) in rendering judgment for the named defendant, must the judgment be vacated and the case remanded to state court?

PARTIES

The parties to this action are Gary Bryant, an individual, and Ford Motor Company ("Ford"), a corporation, the parties listed in the caption. Ford alone files the within petition. Ford's corporate subsidiaries and affiliates are listed in Appendix C.

The Complaint also listed as defendants "Does 1-50," but did not describe or otherwise identify them, or charge them with any actionable conduct. Following judgment plaintiff asserted that three other corporations, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company also should be parties. Ford, the petitioner here, is unaware of the existence of any corporate subsidiaries or affiliates of those entities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Ford Motor Company ("Ford") respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Amended Opinion of the Ninth Circuit vacating the judgment of the District Court is reported in 844 F.2d 602 (9th Cir. 1988), a copy of which appears as Appendix A. The District Court's Summary Judgment was unreported, and appears as Appendix B; no findings or conclusions were entered.

JURISDICTION

Ford based jurisdiction in the District Court on 28 U.S.C. § 1441, asserting that the action, originally brought in state court, could have been brought in federal court pursuant to 28 U.S.C. § 1332, and was timely removed. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1), since this is an action in which a Court of Appeals has rendered a final judgment. After consideration by a panel of the Ninth Circuit, and rehearing by a limited en banc panel under Ninth Circuit Rule 35-3, a timely petition for rehearing by the full court of appeals was made. The Ninth Circuit then amended its opinion and denied rehearing on April 15, 1988. This petition is filed within the 90 days allowed by 28 U.S.C. § 2101.

STATUTES INVOLVED

This case involves 28 U.S.C. §§ 1332, 1441, 1446, 1447, and CAL.CIV.PROC.CODE § 474, the pertinent portions of which are set forth in Appendix D.

STATEMENT OF THE CASE

On March 1, 1983, respondent Gary Bryant, a citizen of California, was involved in an automobile accident while driving a 15-year old van. A year later he sued Ford, not a citizen of California, in Los Angeles Superior Court, alleging breach of warranty, negligence, and strict liability. The gravamen of the Complaint was that the vehicle Bryant drove was defective in some unspecified manner. Bryant sued no other defendants by name.

Bryant did, however, also list as defendants "Does 1-50." His Complaint contained no factual allegations against any such Doe. Rather, in conclusory terms, and on "information and belief," Bryant alleged that each Doe

was "legally responsible, negligently or in some other actionable manner" for events referred to in the Complaint, and that all defendants, including all Does, were the "agents, servants, employees and/or joint venturers of their co-defendants" and were acting within the course and scope of such agency, employment or joint venture.

Within 30 days of receiving the summons and complaint, Ford filed its verified petition for removal. Ford alleged that there were no factual averments against the Does and that allegations against the Does were sham. Ford's verified contentions went unanswered by Bryant who never objected to removal or moved to remand. Consequently, the case went forward in federal court. There, discovery disclosed that Bryant actually complained of a defective seat and seat belt restraint system. When Ford demonstrated that it manufactured only the chassis, and did not manufacture or install the seat or seat belt restraint system, the District Court granted summary judgment in Ford's favor.

At the time judgment was entered, Bryant had made no motion contesting the District Court's jurisdiction or seeking amendment to add additional parties. Following entry of judgment, he did move to add three entities as defendants, City Ford Company, General Seating and Sash Company, and Grumman-Olson Company. Two of these allegedly were California corporations, which, had they been parties when the action was filed, would have destroyed diversity and prevented removal. The District Court denied Bryant's motions to add parties post-judgment, finding no excusable neglect under FED.R.CIV.P. 60(b) for the delay in bringing those entities to the court's attention.

On appeal, the Ninth Circuit ordered the District Court to remand the action to state court. In its opinion, the

Ninth Circuit overruled four prior Ninth Circuit opinions, and created a new "bright line rule" for determining when the presence of fictitious Doe defendants destroys diversity of citizenship, thereby preventing removal. Under this new "bright line rule", unless a plaintiff substitutes real persons for such Does or the Does are dismissed, a case containing such Does in the caption — no matter whether it be 1 Doe or 100 Does — can be removed *only* if the plaintiff unequivocally abandons the Does. *Bryant, supra,* 844 F.2d at 605-06. Unequivocal abandonment, the Ninth Circuit held, "occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." *Id.,* 844 F.2d at 606 n.5. Finally, the Court made its new bright line rule applicable to all pending cases, *id.* at 606 n.7, requiring all courts within the Ninth Circuit to remand cases which had been removed with Does in the Complaint.

REASONS FOR GRANTING THE WRIT

I.

Removal Jurisdiction Must Be Determined By Reference To Federal, Not State Law.

In attempting to create a "bright line rule" for removal, the Ninth Circuit relied on state law when instead it was bound to follow federal law. The state law at issue is CAL.CIV.PROC.CODE § 474 (West 1983), which allows a plaintiff to use fictitious parties if he claims ignorance of their names. However, as construed by California courts, this provision applies not only to ignorance of a defendant's name, but also applies to defendants who are not real entities, and are only fictions. A Doe can be named, therefore, but not charged with any actionable conduct. *Barnes v. Wilson,* 40 Cal.App.3d 199, 205, 114 Cal.Rptr.

839, 844 (1974). Since a plaintiff is not required to exercise reasonable diligence to discover either a Doe's entity or facts giving rise to a cause of action against a Doe, *Munoz v. Purdy,* 91 Cal.App.3d 942, 154 Cal.Rptr. 472 (1979), the naming of Does only tolls the statute of limitations against a prospective, unknown defendant charged with no actionable conduct.

Accordingly, in California it is universal practice for plaintiffs in state court to name large numbers of Does (here, 50 Does) and to allege with exceedingly spare averment, as here, that although the names, capacities and actions of the Does are unknown, the plaintiff believes the Does are implicated somehow, and that all defendants were agents of the others. As used in this manner, therefore, John or Jane Doe is not an alias, as in *Roe v. Wade,* 410 U.S. 113 (1973) or *Doe v. Bolton,* 410 U.S. 179 (1973); it is instead a fiction. Prior to *Bryant,* certain Ninth Circuit decisions had branded such Does as phantoms, condemned such Doe allegations as sham, and disregarded such Does for purposes of removal based on diversity, at least where the defendant's verified petition showed them to be sham. *See, e.g., Grigg v. Southern Pacific Co.,* 246 F.2d 613 (9th Cir. 1957); *Chism v. National Heritage Life Insurance Co.,* 637 F.2d 1328 (9th Cir. 1981).

Now, however, the Ninth Circuit has directed that all pending cases containing such Does must be remanded to state court, regardless of whether judgment has been entered, 844 F.2d at 606 n.7, and has dismissed pending appeals on the basis of its newly-created rule. *E.g., Hise v. Garlock,* 841 F.2d 342 (9th Cir. 1988); *Gamble v. General Foods Corp.,* 846 F.2d 51 (9th Cir. 1988). The problem also exists in cases arising in states other than California: more than 30 states allow suit to be brought against

parties with no names. Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases,* 35 STAN. L. REV. 297, 300-01 n.14 (1983). If the rule of the Ninth Circuit spreads, each state will be free to curtail Congressionally-approved removal jurisdiction by the expedient of authorizing suits against "phantoms," who "live not and are accused of nothing." *Grigg, supra,* 246 F.2d at 620. Moreover, the Congressional removal scheme will have been changed by *Bryant* with especially pernicious results: District Courts must remand cases; yet litigants, no matter how much their cases appear to fall within the removal statutes, will be foreclosed from contesting remand decisions by the prohibition against reviewability. 28 U.S.C. § 1447(d).

Certiorari should be granted to rule that this state practice allowing Doe pleading cannot be determinative of federal jurisdiction. As recently as June 21, 1988, this Court confirmed that the source of decision-making in such situations cannot be state law. It must be federal law. In *Stewart Organization, Inc. v. Ricoh Corporation,* 56 U.S.L.W. 4659 (June 21, 1988), the Court held that the determination of venue in a diversity action must be made according to federal law. There, the parties had included a choice of forum clause in their contract, but the District Court, confronted with a motion to transfer under 28 U.S.C. § 1404(a), applied Alabama law which refused to enforce such provisions. This Court held that instead the motion to transfer must be evaluated under federal law. Ruling that both Congress and the state of Alabama had legislated on the same issue — venue — the Court held that federal law governed:

> The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of

> state public policy. If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases make clear that, as between these two choices in a single "field of operation," *Burlington Northern R. Co. v. Woods,* 480 U.S., at ____, the instructions of Congress are supreme.
>
> *Id.,* 56 U.S.L.W. at 4661 (footnote omitted.)

See also Burlington Northern R. Co. v. Woods, 107 S.Ct. 967 (1987).

The federal/state conflict in *Stewart,* which arose in the context of venue, confronted the Ninth Circuit in *Bryant* in the context of removal. Assuming timeliness, removal jurisdiction lies where original jurisdiction would have lain, 28 U.S.C. § 1441, and one of the bases for original jurisdiction is diversity of citizenship. 28 U.S.C. § 1332. Like the District Court in *Stewart,* however, the Ninth Circuit deferred to state law for its construction of a federal statute. Thus the Ninth Circuit's premise was that California's policy allowing the naming of fictitious defendants was determinative of the definition of state citizenship and therefore precluded federal diversity jurisdiction. Yet, as numerous other circuits have held, the determination of citizenship for diversity purposes is controlled by *federal* law. *Mas v. Perry,* 489 F.2d 1396, 1399 (5th Cir. 1974); *Stifel v. Hopkins,* 477 F.2d 1116, 1120 (6th Cir. 1973); *Ziady v. Curley,* 396 F.2d 873, 874 (4th Cir. 1968); *City of Minneapolis v. Reum,* 56 Fed. 576 (8th Cir. 1893). As this Court has said in other removal contexts, "the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for

determining in what instances suits are to be removed from the state to the federal courts." *Shamrock Oil Corp. v. Sheets,* 313 U.S. 100, 104 (1941).

Accordingly, this Court should grant certiorari to rule that the determination of citizenship for purposes of removal jurisdiction is governed by federal law.

II.

The Ninth Circuit's "Bright Line Rule" For Determining Removal Jurisdiction In Cases Containing Fictitious Doe Defendants Conflicts With The Removal Statutes And The Decisions Of This Court.

Looking to federal law demonstrates that the Ninth Circuit's bright line rule precluding removal when fictitious Does are named cannot be sustained. The rule conflicts with the removal statutes in at least three ways. First, under the decisions of this Court, formal or unnecessary parties are to be disregarded for the purposes of determining removability, *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924), and fraudulent or wrongful joinder of parties cannot prevent removal. *Pullman Co. v. Jenkins,* 305 U.S. 534 (1939). Second, removal must occur within 30 days of receipt of the summons and complaint, and if a case is not removable when filed, it must be removed within 30 days of becoming removable as disclosed through the receipt of any "amended pleading, motion, order or other paper." 28 U.S.C. § 1446(b). Third, remand is required only if it is determined prior to judgment that the case was removed improvidently and without jurisdiction; a different test applies following entry of judgment. 28 U.S.C. § 1447(c); *Grubbs v. General Electric Credit Corporation,* 405 U.S. 699 (1972). The Ninth Circuit's rule contradicts each of these firmly-established principles.

A. The Rule Conflicts With Decisions Disregarding Formal Or Unnecessary Parties, Or Fraudulently Or Wrongly-Joined Defendants.

In *Salem Trust Co. v. Manufacturers' Finance Co., supra,* this Court confirmed the principle that a formal or unnecessary party did not defeat removability. There the defendant trust company, a stakeholder between two competing claimants, was not of diverse citizenship with the plaintiff. Nevertheless, the company's presence did not destroy diversity, since the company was not necessary for an adjudication of the dispute between the claimants.

This Court also has firmly held that removal cannot be prevented by the fraudulent or wrongful joinder of non-diverse parties. *See, e.g., Alabama Great Southern Ry. Co. v. Thompson,* 200 U.S. 206, 217-18 (1906); *Wecker v. National Enameling and Stamping Co.,* 204 U.S. 176, 185 (1907); *Chesapeake & Ohio R.R. Co. v. Cockrell,* 232 U.S. 146, 152 (1914) ("[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy"); *Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92, 97 (1921); *Chicago, Rock Island and Pacific Railway Co. v. Schwyhart,* 227 U.S. 184, 194 (1913); *Pullman Co. v. Jenkins,* 305 U.S. 534 (1939). The statute itself provides for removal by "properly joined" defendants. 28 U.S.C. § 1441(b).

As this Court has held,

> It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.

Pullman Co. v. Jenkins, supra, 305 U.S. at 541.

And, as the Court ruled in *Wilson, supra:*

> [The] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. [citation omitted] If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal . . .
>
> *Wilson, supra,* 257 U.S. at 97.

This case, so typical of state court complaints,[1] illustrates the irreconcilable conflict between the state and federal policies. Having named only Ford, and having alleged that all defendants were the agents of each other, Bryant sued for a defective product (the automobile) which had caused him injury. Confronted with such a complaint containing fictitious Doe defendants, the conclusion had to be that the Does were, from a standpoint of *federal* law, formal or unnecessary parties, or fraudulently joined. Indeed, *Wilson's* definition of fraudulent joinder — parties joined "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith," *id.,* 257 U.S. at 98 — exactly described the Does at the time of removal.

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[1]Treatises and form books on California law advise counsel to include in their Complaints Doe allegations of the variety at issue here. *See, e.g.,* R. Weil & I. Brown, California Practice Guide: Civil Procedure Before Trial § 6:58.1 at 6-10 (1988); West's California Code Forms, Civil Procedure, § 474 at p. 475 (1981). The California Judicial Commission even has prescribed printed form complaints for use in many actions which contain pre-printed Doe allegations like the ones in this case. *See e.g.,* 10C California Forms of Pleadings and Practice, at 83 (1988) (example of printed form tort complaint.)

Viewing the Does as unnecessary or fraudulently joined parties is consistent with federal law, which rejects the notion of an unnamed, unidentified, non-existent Doe, whether as a plaintiff or as a defendant. For example, FED.R.CIV.P. 17(a) provides that actions shall be prosecuted in the name of the real party in interest. This rule prevents the naming of Does on the mere possibility that some unidentified claim exists on behalf of some unknown party. Thus when Rule 17 was amended in 1966, the Advisory Committee wrote:

> The provision [that no action shall be dismissed on the ground of non-prosecution in a real party's name until reasonable time has elapsed] should not be misunderstood or distorted. . . . It does not mean, for example, that following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of the suspension of the limitation period.
>
> Advisory Committee Notes to 1966 Amendment to FED.R.CIV.P. 17.

It would be anomalous for federal law to forbid suit in the name of a fictitious party, but to countenance suit against a similarly unknown party, especially for some unknown, unidentified act. Federal law indeed does not create such an anomaly. FED.R.CIV.P. 11 defines a counsel's signature on a Complaint as his certificate that the complaint is "well grounded in fact" and that this conviction was "formed after reasonable inquiry." A Complaint which contains no factual allegations against a defendant cannot be well grounded in fact; a plaintiff who merely

alleges that a defendant is somehow responsible for injury has not made his charge after reasonable inquiry. Moreover, the most venerable of authorities clearly contemplates that defendants be real entities. One cannot read the evaluation of "alien," "citizen" and "party" in *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch) 267 (1807), without concluding that in requiring complete diversity, Chief Justice Marshall was writing of real, not fictitious parties.

The Ninth Circuit's bright line rule conflicts with these federal policies. Deferring to state law, the Ninth Circuit's rule precluding removal holds that "[t]he nature of the allegations against such Doe defendants is irrelevant for federal removal purposes." *Bryant, supra,* 844 F.2d at 605. The Ninth Circuit's rule assumes that Does are real entities. Federal law dictates instead that at the time of removal the Does be classified as formal or unnecessary or fraudulently-joined parties.

B. The Rule Conflicts With Statutory And Decisional Law Requiring Removal At The Earliest Possible Time.

The Ninth Circuit's rule reverses Congress' requirement that removal must occur at the earliest possible time. Section 1446(b) of Title 28 provides in part:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . .
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading,

motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

The provision for early removal reflects Congress' decision reached after unsuccessful previous legislation authorized removal at any time during litigation. *See* 3 Cong. Rec. 4302 (1874); *Powers v. Chesapeake & Ohio Railway,* 169 U.S. 92, 100 (1898) ("This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity."); *Bryant supra,* 844 F.2d at 610-611 (Kozinski, J., dissenting). In keeping with the requirement that removal occur as quickly as possible, this Court has held that the removability must be based on the case disclosed by the pleadings as of the time of removal. *Barney v. Latham,* 103 U.S. 205, 215 (1881).

The Ninth Circuit's rule, however, insures removal at a late stage of the litigation. Under California law a real entity can be substituted for a fictitious defendant at any time during which service of process may be made — but service may be made for a period of *three years.* CAL.CIV.PROC.CODE § 583.210 (West Supp. 1988) (formerly § 581a(a)). Thus, under the Ninth Circuit's rule, the 30 days within which Congress requires removal, 28 U.S.C. § 1446(b), can become at least three years. Often it would be longer. The Ninth Circuit rule directly says that removal *cannot* occur unless the plaintiff drops the Doe defendants or trial commences without service of the Does. *Bryant, supra,* 844 F.2d at 606 n.5. Thus, the three year period for service could expire, the Does could remain in the Complaint and trial nevertheless might not occur until sometime later — but the case still would not be removable until the trial commences. This is not mere conjecture. The time to trial in Los Angeles Superior

Court, for example (the Court from which *Bryant* was removed) often is longer than three years. *See, e.g.*, Judicial Council of California, *1988 Annual Report* at 103.

Even if the Ninth Circuit were correct in its bright line rule that the presence of Does prevents removal based on the Complaint, the Ninth Circuit's second rule that removability is foreclosed entirely until the Does are named, dismissed or voluntarily abandoned cannot be reconciled with the removal statutes. The only two circumstances which constitute voluntary abandonment under the Ninth Circuit's rule are the dropping of the Does or the commencement of trial without them. Therefore, these are the only two circumstances in which removal may occur when a complaint contains fictitious defendants. The statute, however, authorizes removal at any time within 30 days of receipt of "an amended pleading, motion, order or other paper" disclosing that a case has become removable. 28 U.S.C. § 1446(b). As the dissent in *Bryant* demonstrates, this Congressional language covers a variety of circumstances, ranging from answers to interrogatories or requests to admit, to letters, to papers filed in state court. Numerous reported instances show that diversity can be uncovered under just such circumstances. *See, e.g., Barngrover v. M.V. Tunisian Reefer,* 535 F.Supp. 1309 (C.D. Cal. 1982); *Fisher v. United Airlines, Inc.,* 218 F.Supp. 223 (S.D.N.Y. 1963); *Lee v. Altamil Corp.,* 457 F.Supp. 979 (M.D. Fla. 1978); *Miller v. Stauffer Chemical Co.,* 527 F.Supp. 775 (D. Kan. 1981); *Camden Industries Co. v. Carpenters Local Union, etc.,* 246 F.Supp. 252 (D. N.H.), *aff'd.* 353 F.2d 178 (1st Cir.1965). Under the Ninth Circuit's rule, all these must be disregarded. The language of the statute makes clear that Congress intended otherwise.

C. The Rule Conflicts With Statutory And Decisional Law Establishing A Different Standard For Appellate Review Of A Judgment Than For District Court Decision On a Motion To Remand.

The Ninth Circuit's bright line rule also conflicts with the statutes and decisions of this Court because the rule applies both before and after judgment. The statutes and decisions of this Court, however, establish different standards before and after judgment. Section 1447(c) of the removal statutes provides that "if at any time *before final judgment* it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . ." (emphasis added). This statute clearly differentiates between the status of a case before and after judgment. It is only *before* judgment that remand must occur if it appears that the action was removed improvidently and without jurisdiction.

In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), this Court held that regardless of whether a case has been properly removed, if judgment has been rendered, and if the District Court had diversity jurisdiction as between the parties governed by the judgment, the fact that there were other parties with other claims did not defeat the jurisdiction of the District Court to enter judgment. *Grubbs* held that the language of Congress was paramount, and that Congress intended that the removal statutes should be applied uniformly nationwide. *Id.* at 705.

One of the telling points in *Grubbs* was that the plaintiff had made no attempt to remand the case or otherwise challenge the District Court's jurisdiction. *Id.* at 701. Thus, whereas the impropriety of removal might have been raised before judgment, following judgment it could not be raised. The failure to object to removal or move for

remand has been a telling point in earlier decisions of this Court as well, *see, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921), as it was in the District Court here. Here, the verified petition alleging that the Does were sham went unchallenged. The District Court entered judgment without considering the Does, and made explicit, in denying motions for relief under FED.R.CIV.P. 60(b), that it did *not* consider the Does to be real parties. In its ruling, the District Court emphasized that Bryant had neither objected to removal nor moved for remand, and although the court did not enter a formal order dismissing the Does, it did clearly disregard them for the purposes of entering judgment. This was, in effect, what the Ninth Circuit would have called voluntary abandonment, had it occurred in state court: proceedings for a final judgment had commenced without the equivalent of service of the Does.

The Ninth Circuit treated the proceedings differently and ordered remand, despite Bryant's failure to contest the removal. In subsequent decisions the Ninth Circuit has adhered to its rule that judgments are invalid if they were rendered when Does were listed in the Complaint but not formally dismissed. *See, e.g., Gamble v. General Foods Corporation*, 846 F.2d 51, 52-53 (9th Cir. 1988). *Grubbs*, however, and 28 U.S.C. § 1447(c), mandate a different standard: that failure to object to removal constitutes waiver of the defects — here it constitutes abandonment of the Does — once judgment has been entered.

The Ninth Circuit's *Bryant* decision therefore contradicts both the statute and *Grubbs*, solely on the basis that *Bryant* deals with Doe defendants. Thus, certiorari is necessary to rule that the presence of fictitious defendants cannot require remand after entry of judgment when

diversity jurisdiction otherwise exists at the time of judgment.

III.

The Removal Statutes Do Not Allow Remand For The Purpose Of Administrative Ease.

The theme underlying the Ninth Circuit's bright-line rule is one which has been rejected by this Court: administrative convenience. The Ninth Circuit felt it necessary to craft a rule because of perceived confusion caused by its earlier decisions. It adopted the rule that would be easiest to apply. The question, however, is whether federal jurisdiction exists; administrative ease is not a proper basis for decisions on removal and remand. *Thermtrom Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). The one point on which the majority and dissent in *Thermtrom* agree is that the contours of removal and remand are set by Congress. Those contours cannot be changed by a court's desire to fashion its own rules. *See United Steelworkers v. R. H. Bouligny, Inc.,* 382 U.S. 145 (1965) (although union, an unincorporated association, had many of the attributes of a corporation, Congress had not defined its citizenship the same and thus it was not to be treated the same.)

Congress has declined to rewrite the removal and diversity statutes. On numerous occasions, Congress has considered legislative changes to the statutes regulating diversity of citizenship, including abolition of diversity. *See* H.R. 9622, 95th Cong. (1978); H.R. 2202, 96th Cong. (1979); H.R. 6816, 97th Cong. (1982); H.R. 3152, 100th Cong. (1987). These proposals obviously cover removal, too. None of these proposals has become law. The Ninth Circuit's *Bryant* rule, however, effects changes in those very rules which Congress itself so far has been unwilling

to modify. To correct this error, this Court should grant certiorari.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Dated: July 14, 1988

Respectfully submitted,

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APPENDIX A

Gary BRYANT, Plaintiff-Appellant,

v.

FORD MOTOR CO.,
Defendant-Appellee.

Nos. 84-6389, 85-5698.

United States Court of Appeals, Ninth Circuit.

Argued En Banc and Submitted
July 16, 1987.

Decided Nov. 6, 1987.

As Amended on Denial of Rehearing and Rehearing En Banc April 15, 1988.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, Chief Judge, and GOODWIN, SNEED, ANDERSON, CANBY, NORRIS, REINHARDT, HALL, KOZINSKI, THOMPSON, and O'SCANNLAIN, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiff-appellant Gary Bryant appeals from the decision of the district court granting summary judgment in favor of defendant-appellee Ford Motor Company. We conclude that the district court lacked jurisdiction over this action because of the presence of Doe defendants at the time of removal from state court.

I.

Bryant initiated this action for negligence, breach of warranty, and strict liability in California state court against Ford and Does 1 through 50. Ford removed the action to the United States District Court for the Central

District of California based upon diversity of citizenship.[1] Bryant did not object to removal. The district court took no action with respect to the Doe defendants.

Bryant seeks recovery for injuries he sustained in an accident while driving a Ford van for United Parcel Service on March 1, 1983. Bryant contends that the passive restraint system in the van was defective because it did not include a shoulder harness. Bryant's complaint alleges that Does 1 through 50 are related to each other and to Ford as "agents, servants, employees and/or joint venturers." Bryant claims that Ford and each of the Doe defendants were involved in the design, production, inspection, and distribution of the van which Bryant was driving at the time of the accident.

A joint inspection of the van by the parties on May 10, 1984 revealed that Ford had manufactured only the chassis of the van. The body and other components, including the passive restraint system, were produced by other companies as part of a joint venture. The companies responsible for producing the component parts could not

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[1]28 U.S.C. § 1441 (1982) provides, in relevant part, as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

be identified at the time of removal or the time of inspection because the van was produced in 1968 and Ford destroyed records containing this information after ten years.

Ford moved for summary judgment. In opposing Ford's motion, Bryant noted that he planned to name Doe defendants as soon as he discovered their identities. The district court nonetheless granted summary judgment in favor of Ford, concluding that there were no material facts supporting Ford's liability because of the inspection evidence that Ford was not involved in the production of the passive restraint system.[2] Bryant then moved the court to add City Ford Company, the seller of the van, General Seating and Sash Company, the producer of the seats, and Grumman-Olson Company, the producer of the body, to the action and to remand the case to state court. City Ford and Grumman-Olson are California corporations. The district court denied Bryant's motion, finding that the presence of non-diverse parties was not new evidence justifying relief from judgment under Fed.R.Civ.P. 60(b) (1982).

Bryant appealed the grant of summary judgment. We granted a limited remand at Bryant's request for the district court to again reconsider its previous rulings. The district court again refused to join the additional parties, and this appeal of the district court's rulings followed.

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[2]The district court did not enter judgment against the Doe defendants. Despite the fact that the Doe defendants were not formally dismissed, this case is properly before this court. *See Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir.1984) ("If an action is dismissed as to all of the defendants who have been served and only unserved defendants remain, the district court's order may be considered final under [28 U.S.C. § 1291] for the purpose of perfecting an appeal.").

Applying Ninth Circuit law, a panel of this court then held that because the Doe defendants in the complaint were real but unidentified people or entities, the district court could not determine whether they would defeat diversity jurisdiction once identified. *Bryant v. Ford Motor Co.,* 794 F.2d 450, 453 (9th Cir.1986). The panel remanded the case to the district court with instructions to remand to the appropriate state court. *Id.* After a petition for rehearing was filed, the panel requested en banc consideration of this case in order to clarify Doe defendant law in the Ninth Circuit. For the reasons set forth below, we now remand this case to the district court with instructions to remand to the appropriate state court.

II.

California law allows a plaintiff to sue any potential defendant whose name is unknown under a fictitious name (commonly as a Doe defendant). Cal.Civ.Proc.Code § 474 (West 1979).[3] A plaintiff who names a Doe defendant in his complaint and alleges that the defendant's true name

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[3]Cal.Civ.Proc.Code § 474 (West 1979) provides, in relevant part, as follows:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on

is unknown has three years from the commencement of the action in which to discover the identity of the Doe defendant, to amend the complaint accordingly, and to effect service of the complaint. Cal.Civ.Proc.Code § 581a (West 1976).[4]

Up to this point, the general rule in the Ninth Circuit has been that the naming of Doe defendants defeats diversity jurisdiction and, therefore, that district courts should remand cases containing allegations against Doe defendants to state court. *See, e.g., Othman v. Globe Indem. Co.,* 759 F.2d 1458, 1462-63 (9th Cir.1985). This general rule has become riddled with exceptions, however. Under our cases, an action need not be remanded to state court in at least five situtations: (1) when named defendants prove that the Doe defendants as described in the complaint are wholly fictitious, *see, e.g., Grigg v. Southern*

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behalf of) the person sued under the fictitious name of (designating it)."

[4]When Bryant commenced this action in state court, the relevant provision was Cal.Civ.Proc.Code § 581a(a), 1982 Cal.Stat. 2574-75 (repealed 1984), which provided as follows:

> (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

This section has since been repealed, but a substantially similar provision has been enacted as Cal.Civ.Proc.Code § 583.210 (West Supp.1987).

Pacific Co., 246 F.2d 613, 619 (9th Cir.1957); (2) when the complaint contains no charging allegations against the Doe defendants, *see, e.g., Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir.1981); (3) when plaintiffs unequivocally abandon their claims against the Doe defendants, *see, e.g., Southern Pac. Co. v. Haight*, 126 F.2d 900, 905 (9th Cir.), *cert. denied*, 317 U.S. 676, 63 S.Ct. 154, 87 L.Ed. 542 (1942); (4) when the complaint does not identify the Doe defendants with sufficient specificity, *see, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir.1982); and (5) when the Doe defendants are not indispensable parties, *see, e.g., Othman*, 759 F.2d at 1463.

The numerous exceptions to the general principle that the naming of Doe defendants defeats diversity jurisdiction have led to considerable confusion as we ourselves have recognized. In *Othman*, 759 F.2d at 1462 & n. 7, we noted that "the circumstances under which an action including 'Doe' defendants may be removed to federal court [are] not entirely clear in this circuit." *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n. 2 (9th Cir.1984) (describing "the vague contours of when Doe pleading is specific enough to defeat diversity"). District court judges and commentators have also noted the doctrinal disarray in our decisions. *See, e.g., Goldberg v. CPC Int'l, Inc.*, 495 F.Supp. 233, 236 (N.D.Cal.1980) (circumstances under which the presence of Doe defendants destroys diversity "unfortunately remain shrouded in mystery and confusion"); Note, *Doe Defendants and Other State Relations Back Doctrines in Federal Diversity Cases*, 35 Stan.L.Rev. 297, 308 n. 38 (1982) (noting inconsistency in Ninth Circuit case law).

At the request of the three-judge panel, this court agreed to hear this case en banc in order to develop a coherent standard in the Doe defendant area. We now hold that the presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal. The nature of the allegations against such Doe defendants is irrelevant for federal removal purposes. *See CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272, 1277 (N.D.Cal.1986). We overrule all of our cases creating exceptions to this general rule. *See, e.g., Grigg,* 246 F.2d at 619; *Chism,* 637 F.2d at 1330; *Hartwell,* 678 F.2d at 843; *Othman,* 759 F.2d at 1463. Under our new rule district courts will no longer have to make the near-impossible determination of when the allegations against Doe defendants are "specific" enough to defeat diversity. Instead, the 30-day time limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff,[5] or dismissed by the state court.[6] If a defendant attempts to remove a case

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[5]Unequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants. *See Haight,* 126 F.2d at 904-05.

[6]The voluntary-involuntary rule, which provides that only a voluntary act of the plaintiff can render a case removable to federal court, applies only to state court judgments on the merits against named defendants. *See, e.g., Self v. General Motors,* 588 F.2d 655 (9th Cir.1978). This rule is inapplicable to the dismissal by state courts of Doe defendants.

We recognize that our rule may lead to removal at a late stage in the proceedings. A defendant may be able to expedite removal, however, by seeking the plaintiff's consent to drop the Doe defendants. We disagree with the dissent's assumption that plaintiffs will not facilitate removal by stipulating to dismiss the Doe defendants.

prior to this time, the district court must remand the case to state court.[7] This new rule accommodates both a plaintiff's right under California law to a three-year ex-

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Dissent at 611 n. 9. Plaintiffs have an incentive to make such a stipulation in order to expedite the litigation. This is especially true in cases where Doe defendants are "phantoms." In such cases, plaintiffs will be reluctant to delay the inevitable removal of their cases, thereby delaying their day in court.

The dissent makes a number of other assumptions which we are unwilling to make. First, the dissent states that "every" civil case now filed in California contains allegations against Doe defendants and that the "vast majority" of these defendants are "procedural fictions" or "phantoms" invoked " 'superstitiously and without reason.' " *See, e.g.,* Dissent at 608 (citation omitted), 609, 611, 611-612, 612, 613-614, 613-614, 618. We disagree. The dissent cites no evidence for its assumption that every civil case now filed in California contains allegations against Doe defendants. Moreover, when Doe defendants are named, they are frequently named because a plaintiff is unable to discover who the additional defendants are prior to filing suit. For example, in this case, it was only after discovery that Bryant was able to determine the identities of City Ford, General Seating and Sash, and Grumman-Olson.

Second, the dissent assumes that our decision will allow states to foreclose removals altogether. *Id.* at 611 n. 10. On the contrary, there is no reason to believe that states will enact Doe defendant statutes in a bad faith attempt to defeat the federal removal statute.

Finally, the dissent assumes that our solution will delay removal in "virtually *every*" California diversity case for three years or more. *Id.* at 613 (emphasis in original). The waiting time for obtaining a trial date, however, is considerably less than three years in most California counties. It is preposterous to assume that "virtually every" removal will be delayed for three years or more.

[7]This new rule will apply retroactively. Federal courts should remand pending cases containing allegations against unnamed Doe defendants to state court unless both parties agree to dismiss the Doe defendants.

tension of the statute of limitations and a defendant's statutory right to removal under 28 U.S.C. § 1441.[8]

III.

Because the complaint in this case contained Doe defendants as parties, removal was premature. We REMAND to the district court with instructions to remand to the appropriate state court. Each party shall bear its own costs on this appeal.[9]

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[8]The dissent states that its solution "would eliminate *all* the problems associated with the addition of Doe defendants." *Id.* at 619 (emphasis in original). As the dissent admits, however, its solution may lead to parallel litigation in state and federal court. *Id.* at 619. We simply are not convinced that the potential for duplication of effort under our solution is any greater than under the dissent's solution.

Furthermore, the dissent claims that federal courts can accommodate a plaintiff's right to add Doe defendants by remanding the portion of the case alleging claims against the Doe defendants to state court. Absent from the dissent's analysis is any mention of what action a court should take when a plaintiff attempts to name a *diverse* Doe defendant after the 120 day time limit contained in Fed.R.Civ.P. 4(j) has expired. If such a case were remanded to state court, the diverse defendant could simply re-remove to federal court, resulting in an unwarranted ping-pong game between state and federal court. On the other hand, if the federal court were to deny the plaintiff the opportunity to name the diverse Doe defendant, it would be denying the plaintiff an important state law right.

[9]Ford also argues that in our earlier opinion we used the wrong test to determine whether the district court should have remanded the case. Ford correctly notes that Bryant did not challenge the removal before final judgment was entered. When removal is not challenged until after judgment has been entered, the standard is not whether removal was proper, but whether the district court would have had original jurisdiction if the case had been filed in that court in the posture it was in as of the time of trial or judgment. *Grubbs v.*

NORRIS, Circuit Judge, concurring:

I concur in the judgment because I agree that the district court lacked jurisdiction at the time of removal. Bryant's complaint alleged that Ford and each of the 50 Doe defendants were involved in the design, production and distribution of the Ford van which Bryant claimed had a defective passive restraint system because it did not include a shoulder harness. At the time of removal, Ford made no effort to show that no California resident could have committed acts within the charging allegations of the complaint and thus failed to carry its burden of establishing complete diversity. *See Pullman Co. v. Jenkins,* 305 U.S. 534, 540, 59 S.Ct. 347, 350, 83 L.Ed. 334 (1939) (named defendant bound to show unnamed defendant a nonresident to justify removal). It made no effort, for example, to show that no one who had any involvement in the design, production or distribution of the van was a resident of California. Consequently, I believe we should decide this case on the narrow ground that the district court lacked jurisdiction because of Ford's failure to show complete diversity at the time of removal.

Although I concur in the judgment, I cannot join the court's opinion because I agree with Judge Kozinski that the court writes too broadly. *Dissent* at 608. The court says that there can be no removal until all Does are either named, unequivocally abandoned, or dismissed in the

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General Electric Credit Corp., 405 U.S. 699, 705, 92 S.Ct. 1344, 1348, 31 L.Ed.2d 612 (1972); *Gould v. Mutual Life Insurance Co.,* 790 F.2d 769, 773-74 (9th Cir.1986). Even under this standard, however, remand is required. The presence of Doe defendants destroys diversity of citizenship. Here, the Doe defendants were never dismissed. Accordingly, original jurisdiction would not have lain with the district court. *See Garter-Bare Co. v. Munsingwear, Inc.,* 650 F.2d 975, 981 (9th Cir.1980); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3642 (1985).

state court action. *Opinion* at 605-606. This necessarily means that an action may not be removed as long as a Doe defendant continues to be named in the complaint and remains unidentified. Thus, the court effectively adopts a rule that Doe defendants are conclusively presumed to be real, not phantom or sham, and are conclusively presumed to be nondiverse. I believe that such a conclusive presumption is inconsistent with *Pullman* which I read as requiring that a nonresident defendant must be given the opportunity at the time of removal to show that no legitimate defendant is a resident. 305 U.S. at 541, 59 S.Ct. at 350 ("It is *always open* to the nonresident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.") (emphasis provided).[1]

Suppose hypothetically that Ford had filed affidavits with its removal petition showing that the van had been designed and assembled in Michigan, and that all components, including the passive restraint system, had been produced by companies outside of California, and that Bryant's employer purchased the van from a dealer in Detroit, took delivery in Detroit, and drove the van to California. Suppose further that Bryant was unable to

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[1]In *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272, 1274 (N.D.Cal.1986), Judge Schwarzer gave the defendant the opportunity to show that the Doe allegations should not defeat diversity by proving that all potential defendants encompassed by the charging allegations were diverse or that the charging allegations were shams. *Id.* at 1274. Although in *CTS Printex* the defendant's affidavits failed to establish that no California resident could have committed acts within the charging allegations of the complaint, the defendant in that case was at least given the opportunity to make an evidentiary showing that all conceivably liable Doe defendants were nonresidents. *See id.* at 1274 n. 1.

come up with any evidence to controvert the facts set forth in Ford's affidavits. It seems to me that had that been the state of the record at the time the district court acted on Ford's removal petition, removal would have been proper and subject matter jurisdiction would have vested in the district court. A defendant's burden to show complete diversity when faced with Doe allegations may be a heavy one, but I see no justification for denying defendants the opportunity to try.

KOZINSKI, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting.

The court has taken this case en banc to resolve a problem that has vexed our district courts for some time: how to treat fictitious parties — so called Doe defendants — when a case is removed from state court on the basis of diversity of citizenship. That the problem is real and serious is without doubt.[1] Far more in doubt is the court's solution. The court does not explain why it has chosen that particular approach to the problem, nor does it consider alternatives that might better reconcile the relevant state and federal interests.

The court's lack of analysis reflects, perhaps, the dearth of briefing and argument on the issue. The case was

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[1] *See, e.g., Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir.1985); *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842 (9th Cir.1982); *Preaseau v. Prudential Ins. Co. of Am.*, 591 F.2d 74 (9th Cir.1979); *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272 (N.D.Cal.1986); *Schmidt v. Capitol Life Ins. Co.*, 626 F.Supp. 1315 (N.D.Cal.1986); *Brennan v. Lermer Corp.*, 626 F.Supp. 926 (N.D.Cal.1986); *see generally* Note, *John Doe, Where Are You? The Effects of Fictitious Defendants on Removal Jurisdiction in Diversity Cases*, 34 Ala.L.Rev. 99 (1983); Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan.L.Rev. 297 (1983).

presented to the en banc panel on the basis of the petition for rehearing, the opposition thereto and the reply. No additional briefing was called for. The rule the court now adopts as the law of the circuit — the so-called *CTS Printex* rule, named after the district court case where it was first announced, *CTS Printex, Inc. v. American Motorists Ins. Co.* 639 F.Supp. 1272 (N.D.Cal.1986) — was mentioned only in passing in the opposition to the petition for rehearing and the reply. It was not discussed at any detail at oral argument. No one argued against its adoption or presented any argument that might expose its flaws.[2]

I respectfully suggest that the court's new rule does, in fact, have serious flaws. As I discuss at greater length below, today's decision will have very serious effects on

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[2]The court is relying, perhaps, on the fact that the rule was adopted by Judge Schwarzer, a careful and respected jurist. But Judge Schwarzer, too, adopted the rule without the benefit of argument by counsel. The issue of how to apply and implement this court's decision in *Lindley v. General Elec. Co.*, 780 F.2d 797 (9th Cir.), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed.2d 554 (1986), first came up during the oral argument on the motion to remand. The parties were unaware of the case but Judge Schwarzer announced that he interpreted *Lindley* to require a wholly new approach and would write an opinion. In response to counsel's request that the issue be briefed, he stated as follows:

> I don't care if you want to send me a memorandum. I'm going to issue a written opinion on this, although I'll tell you now informally, I intend to grant the motion to remand, and *I don't want to have you people engage in any briefing about this,* but if you want to make a brief comment in a letter, I won't stop you from doing it . . . *I don't see any need to respond.* You can be guided accordingly.

Reporter's Transcript at 13 (July 3, 1986) (emphasis added). It thus appears that the rule the court adopts today is entirely judge-made: It has never been briefed or argued by any party to any court.

the operation of the removal statute in any state that allows Doe pleadings, as does California. Moreover, the court's bright-line rule is in large part dicta and its binding force is therefore highly questionable.

The Court's approach is particularly troubling because orders remanding cases to the state courts are ordinarily not appealable. 28 U.S.C. § 1447(d) (1982); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S.Ct. 584, 593-94, 46 L.Ed.2d 542 (1976). Insofar as the court today defers or entirely forecloses a large number of removals, there may be little or no opportunity to correct any error or fine-tune the rule of decision. This should not deter us from doing what we think is necessary. But it does counsel making very sure that we are right. I am just not sure that we are.

I.

A. The Rationale of the Cases the Court Is Overruling Continues to Have Vitality

The court overrules four lines of closely related authority that attempt to distinguish between two types of Doe defendants: those that are real, but whose precise identities are unknown, and those that are procedural fictions, named only for the purpose of preserving the plaintiff's right to add defendants that he might learn about later. The cases the court overrules today stand for the proposition that where the Does are of the second variety — phantoms named solely to toll the running of the statute of limitations — they will not interfere with the exercise of federal jurisdiction. No one has made the point so eloquently as our venerable Chief Judge Emeritus in *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir.1957), the earliest of the cases the court is overruling:

> Perhaps these Does have some proper place under California state practice. But it is hard to believe they serve any purpose when they are included superstitiously and without reason. Certainly their phamtoms, when Does live not and are accused of nothing, should not divert the course of justice.

Id. at 620 (Chambers, J.). Similar sentiments are expressed in other cases. *See, e.g., Hartwell Corp. v. Boeing Co.,* 678 F.2d 842, 843 (9th Cir.1982); *Chism v. National Heritage Life Ins. Co.,* 637 F.2d 1328, 1330 (9th Cir.1981); *Asher v. Pacific Power & Light Co.,* 249 F.Supp. 671, 676 (N.D.Cal.1965).

This concern, it seems to me, is a legitimate one. While there may be a small number of cases where defendants are known to exist but their names are not available, there are many more cases where Doe defendants alleged in the complaint are simply procedural fictions. My understanding is that nearly every civil case now filed in California contains Doe allegations.[3] The reason is simple: It would be malpractice for a lawyer to omit such allegations if there is even the remotest chance that other defendants

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[3]The authors of a leading treatise on California practice, both Superior court judges, state that "[n]aming 'Doe' defenants can be useful in several situations: (1) Where plaintiff does not know the name of the person who injured him or her (or knows them only by nicknames or incorrect names); (2) Where plaintiff knows the name of the persons who injured him or her, but has reason to believe they were not acting alone . . . [and] (3) Where plaintiff does not know all the facts upon which liability depends, and therefore is ignorant of the defendants' liability (even if plaintiff knew their names all along)." R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 6:58.1, at 6-10 (1985). The authors emphasize that "[i]n each of the above situations, naming 'Doe' defendants is a good practice because it 'keeps the door open.' It enables plaintiffs to join other persons when their identities or responsibility is discovered."

might turn up. This means that there is a fair number of cases — perhaps the overwhelming majority — where all the parties that will ever turn up are already before the court and the presence of Doe allegations impairs removal for absolutely no good reason.

The decisions the court overrules today attempted the difficult but important task of distinguishing the cases where Does are real but unidentified parties from those where they are nothing more than procedural fictions. What the court's opinion documents quite clearly, and what our district judges and lawyers have been telling us, is that the fine line-drawing required to separate the goats from the sheep in this fashion is too burdensome and results in too much uncertainty. *See, e.g., CTS Printex,* 639 F.Supp. at 1277.

Fair enough. The need for a bright-line rule, capable of more predictable application, is squarely presented to us. Yet this does not nullify the reasons we adopted the more complex rule in the first place. *Grigg* and its progeny pursued an important objective: preserving the authority of the federal courts to exercise jurisdiction conferred on them by an Act of Congress. That interest ought not be defeated by a state procedural device that in most instances is invoked "superstitiously and without reason." 246 F.2d at 620. We should fashion a rule that takes these concerns into account and minimizes the conflict between the federal interest in the proper exercise of removal jurisdiction and the state interests represented by the Doe pleading practice.

The rule the court adopts fails to do this. Without any discussion, the court abandons the federal interest *Grigg* and its progeny sought to protect. In Judge Chambers' words, the phantoms of Does that "live not and are

accused of nothing" are now given substance for the purpose of deferring or defeating federal jurisdiction.

If the court is intent on adopting a bright line rule, there are two from which it can choose: one that treats Doe defendants as *always* destroying diversity, and one that treats them as mere procedural fictions, *never* destroying diversity. I fear that the court has selected the wrong bright-line rule, the one that least well reconciles the relevant state and federal interests.

B. The Court's New Rule Seriously Interferes with the Federal Court's Exercise of Jurisdiction Under the Removal Statute

The court recognizes that its rule "may lead to removal at a late stage in the proceedings." Majority op. at 606, n . 6. Probably more accurate is the observation in *CTS Printex* that, under the new rule, removal "may occur on the eve of trial (if trial occurs within three years of filing of the complaint) . . . ." 639 F.Supp. at 1277. Even if trial is delayed, removal will not always be available after three years. While California law requires that defendants be served within three years, the rule is subject to a variety of exceptions and exclusions. *See* Cal.Civ.Proc. Code §§ 583.220-240 (West Supp.1987).[4] In addition, the three-year rule is also subject to judicial interpretaion that provides further refinements and exception. *See, e.g., Barrington v. A.H. Robins Co.,* Cal.3d 146, 157, 216 Cal.Rptr. 405, 411, 702 P.2d 563, 568 (1985).

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[4]Section 583.220 allows for waiver of the three-year service period by stipulation of by defendant's general appearance. Pursuant to section 583.230, the parties may agree to extend the time for service. Finally, section 583.240 lists certain additional stiutations extending the time within which service must be made.

Thus, under the majority's rule, removal will be delayed to the eve of trial,[5] to three years after filing, or to some far later time. This is very, very late indeed to be bringing cases to federal court under a statute that, by its terms, directs that removals occur within thirty days after the filing of the complaint. This wholesale delay of removals in virtually all diversity cases filed in California (and perhaps other states allowing Doe pleadings)[6] is not only at odds with the plain statutory language, it defeats longstanding congressional policy with respect to removals and will result in a variety of practical problems.

1. *The Majority's Approach Conflicts with the Policy of the Federal Removal Statute*

The federal removal statute, 28 U.S.C. §§ 1441-1452 (1982 & Supp. III 1985), embodies congressional policy that cases brought in state court be transferred to federal court if they could have been brought there in the first place. *See Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). This provision dates back to the Judiciary Act of 1789, 1 Stat. 73, 79 (1789), and, except for a short period during the 19th century, has reflected two policies: First, cases should be removed as early as possible in the litigation, *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92, 100, 18 S.Ct. 264, 267,

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[5]Actually, removal may be delayed to as late as the close of plaintiff's case-in-chief because, at the trial-setting conference, the court may not compel a plaintiff to drop fictitious defendants or condition the setting of trial date upon his doing so. Cal.R.Ct. 220(b).

[6]We do not know how many of the states in our circuit employ a Doe pleading procedure analogous to California's. At oral argument, one of the attorneys stated that eight of the nine states in the circuit have some procedure for suing fictitious defendants, although it is unclear just how closely they resemble California's.

42 L.Ed. 673 (1898); second, federal removal law should be consistent nationwide, unaffected by differences in state law. *Grubbs,* 405 U.S. at 705, 92 S.Ct. at 1348; *Chicago, R.I. & Pac. R.R. v. Stude,* 346 U.S. 574, 580, 74 S.Ct. 290, 294, 98 L.Ed. 317 (1954); *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941). The rule the court adopts today offends both of these policies.

Legislative histories were not in the early days of the Republic what they are today (perhaps fortunately so). We therefore have little to tell us why the drafters of the first Judiciary Act required removal early in the litigation. What we do have, however, is an experiment during the Reconstruction era when removals were allowed any time before trial. This innovation was short-lived. In 1875, the date was moved back closer to the commencement of the litigation. 18 Stat. 471 (1875). Such legislative history as we have shows the obvious: The rule change was occasioned by dissatisfaction with removals so close to trial. In the course of debates on the floor of the House, Congressman Poland declared:

> The third section of this bill provides that in all actions hereafter brought the application for removal shall be made at the first term of the court thereafter. That was the old law of 1789, that when the defendant sought a removal of the cause he must do so at the time of entering his appearance. But in later statutes, especially those passed during and since the war, we have provided that applications for removal may be made at any time before trial; which I think, and the committee think [sic], is very mischievous in its consequences. A party will let his case run on in a State court until he is satisfied that he will be beaten, and then dodge off into a Federal court. The third section of this bill provides

> that in all suits hereafter commenced the practice shall go back to the act of 1789, and parties seeking the removal of causes shall do so at the very outset.

3 Cong.Rec. 4302 (1874).

This has been the law ever since, although the precise formula has varied from time to time.[7] As the Supreme Court stated in *Powers:* "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity." 169 U.S. at 100, 18 S.Ct. at 267. There is good reason for this. Late removals can be extremely disruptive, lead to serious duplication of effort and be manipulated for tactical advantage. *See* pp. 612-613 *infra.*

To be sure, the rule is not absolute; it does allow for slippage where the case becomes removable later in the litigation. *See* 28 U.S.C. § 1446(b). However, it is important to recognize that the exception is just that, an exception. It should not be allowed to swallow up the basic policy of early removal. The court's new rule thwarts this settled policy by postponing removal based on diversity of citizenship for at least three years in practically every case coming out of California, a state that is responsible for well over half of the diversity filings in the nation's largest circuit.[8] I can think of no more effective way of undermining the congressional policy of early removal.[9]

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[7]In 1949, the statute was amended to require removal within twenty days after the filing of the complaint. 63 Stat. 101 (1949). In 1965, the period was extended to thirty days after the filing of the complaint. 79 Stat. 887 (1965).

[8]1987 Annual Report of the Ninth Circuit 53.

[9]The court suggests that "[a] defendant may be able to expedite removal . . . by seeking the plaintiff's consent to drop the Doe defend-

The court's rule also undermines the congressional policy that removal procedures be uniform in the federal courts, unaffected by the vagaries of state law. The court's rule gives California — and every other state that has or can adopt a California-style Doe pleading rule — the authority to defer federal removal for years, perhaps indefinitely.[10] Congress did not intend that the right to remove be manipulated by state law in this fashion. As the Supreme Court said in *Shamrock*, "[t]he removal statute, which is nationwide in it operation, was intended to be uniform in its application, unaffected by local law definition or characterization. . . ." 313 U.S. at 104, 61 S.Ct. at 870.

Moreover, deferring removals on a wholesale basis is more than a question of timing; it significantly affects the very availability of removal, impairing the exercise of a right guaranteed by Congress. Many cases are terminated early in the litigation by dismissal or summary judgment on the basis of procedural default or for some other reason. As to those cases, removal is effectively denied under the court's rule even if there is not the slightest possibility that any of the Does will materialize or that they would destroy diversity.

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ants." Majority op. at 606 n. 6. This possibility is an illusion. A plaintiff who chose the state court would have no reason to help facilitate removal. Even if so inclined, why would a plaintiff agree to drop the Doe defendants and give up the benefit of tolling the limitations period?

[10]Three years for adding Does happens to be the current California practice. *But see* pp. 605-606 & nn. 4-6 *supra*. The court's rationale would apply equally, however, if state law permitted five years, ten years or any other period. By making the period long enough, the state can foreclose removals altogether.

Equally troubling, delaying removal to the eve of trial, or for three or more years into the litigation, changes significantly the incentives for and against removal, subjecting it to the kind of manipulation Congress condemned when it amended the removal statute in 1875. *See* p. 610 *supra*. The decision to remove at the start of litigation is based principally, perhaps entirely, on the choice of forum, the choice Congress meant for defendants to make. On the eve of trial, a decision to remove is based on far different considerations. For one thing, the possible advantages of federal pretrial practice and case management would no longer be relevant. Moreover, a defendant would have to consider whether to remove the case and possibly expose himself to another round of discovery in district court or, conversely, whether to remove in order to subject the plaintiff thereto.

Also relevant at that point would be the outcome of various pretrial rulings. A defendant who found himself on the losing side of such rulings might view removal as an opportunity to relitigate those issues. *See* pp. 612-613 *infra*. Perhaps most obviously — and least appropriately — removals on the eve of trial can be used as devices for oppression by further delaying a plaintiff's day in court,[11] precisely what Congress worried about when it moved the removal date back to the start of the litigation.[12] If there are sufficient reasons for adopting a rule that so runs against the grain of the removal statute, the court does not explain what they are.

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[11]Standing the maxim on its head, defense lawyers are fond of quipping that justice delayed is justice.

[12]Fears that defendants will remove cases as they are about to go to trial are not imaginary. A number of the reported cases involved such removals. *See, e.g., Powers*, 169 U.S. at 94, 18 S.Ct. at 264; *Preaseau*, 591 F.2d at 75 (case removed during recess on first morning of trial).

2. The Court's Rule Will Create Serious Practical Problems

Deferring removal of all diversity cases for three years will create a number of procedural problems. For starters, this will generate a substantial duplication of effort. When a case is removed to federal court, all interlocutory rulings of the state court are subject to reconsideration by the district judge. 28 U.S.C. § 1450; *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435-37, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d 435 (1974); *Preaseau*, 591 F.2d at 79; 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168[4.-1], at 640 (2d ed. 1987). This would include discovery rulings, decisions on summary judgment motions and interlocutory stays and injunctions. The later the removal, the more interlocutory rulings there are likely to be, and the greater the opportunity for relitigation. While federal judges may generally defer to their state colleagues on these matters, losing litigants have every incentive to seek reconsideration in the new forum. In *Preaseau*, for example, they did so and were successful. 591 F.2d at 79-83. But win or lose, the attempt will consume the time of the court and the money of the parties. When state and federal courts are barely able to handle their burgeoning caseloads, and there are frequent and justified complaints about the cost and delay of litigation, the court should be reluctant to fashion a rule that will cause such wholesale duplication of effort.

We also should not underestimate the disruption caused by plucking cases from the state courts many years after the start of litigation. Discovery may be discontinued or disrupted; pending motions would have to be withdrawn from the state court and refiled or reargued before the district court; injunctions, stays, receiverships and other equitable remedies would have to be trans-

ferred and conformed to federal procedural and bonding requirements. Various rulings may be in the process of interlocutory appeal to the state appellate courts; such appeals would be short-circuited by removal. Any trial date set by the state court would have to be cancelled, with the attendant disruption to parties and witnesses, and the case would normally take its place at the bottom of the district court's civil docket. And, all of this assumes both parties are acting in the best of faith; if one side wants to use the removal as an excuse for dragging its feet, it will find plenty of reasons for doing so. While it is difficult to predict with any accuracy what procedural problems this will spawn, it is a fair guess that there will be many more than if the cases were removed thirty days after filing of the complaint, as Congress intended.[13] Some of these problems may occur now when the right to remove does not arise until late in the litigation. But, again, these are exceptions, rare situations that may involve an occasional disruption. It is quite a different matter when removal is delayed in virtually *every* diversity case coming out of California (and perhaps other Doe states) for three years or more.

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[13]It is also worth considering that, under the court's rule, removal hinges entirely on the ruling of the state court on any motion to dismiss the Doe defendants after the three-year time period has expired. As noted earlier, this is not necessarily a routine motion calling merely for a calculation of time: There are a number of exceptions to the three-year rule, and the state court may have to make some close judgments as to whether the Does are properly out of the case. *See* pp. 605-606 & nn. 4-6 *supra*. What if the state court errs in that ruling? It seems odd to vest the state court with unreviewable authority to determine the timing of removal, a question of federal law.

C. The Court's New Rule Has Serious Flaws

All that having been said, I might nevertheless be willing to go along with the court's rule if I thought it represented a tenable reading of the removal statute. It does not. Indeed, in order to make the rule work at all, the court has to address situations not presented by this record; must of the court's supposedly bright-line rule is therefore dicta.

While the court's rule appears to be simple enough, it in fact deals with two rather distinct issues: (1) whether inclusion of Doe parties in the complaint destroys diversity; and (2) when Does originally pled may be deemed eliminated so that an originally non-diverse case becomes diverse. The court is certainly in a position to address the first question: We have here Doe allegations that, arguably, were sufficiently specific to destroy diversity. If the court wants to say that Doe allegations, no matter how unspecific, will always destroy diversity, it certainly may do so, although I would question the wisdom of the rule.

But the court goes much further than this. In an effort to adopt a simple rule that will solve all problems, the court goes on and addresses the second question: when Doe allegations disappear from a case by abandonment or otherwise. But the court is in no position to speak on this issue because the case before us does not present the issue of abandonment: No one has claimed that the Doe defendants have been abandoned and every indication is that the plaintiff fully intends to rely on the Doe allegations. Under these circumstances, that part of the court's bright-line rule dealing with this issue is, quite simply, dicta, and very mischievous dicta at that. Perhaps because the issue is not presented to us in a concrete controversy, the rule the court adopts runs rough-shod over the statutory language and demonstrably excludes a

variety of situations where federal jurisdiction is authorized by the removal statute.

The removal statute provides that if the case is originally not removable, the defendant may remove within 30 days after he receives "a copy of an amended pleading, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). The court here reformulates this statutory standard as follows: "The 30-day time limit for removal . . . will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court." Majority op. at 605-606 (footnote omitted). The first of these possibilities is tantalizing but meaningless. The typical complaint filed in the California courts pleads Does by the dozens, sometimes by the hundreds, far outnumbering the defendants that could conceivably be brought into the case. There are fifty Does in this case alone. *See* p. 615 n. 14 *infra*. The last possibility — dismissal of the Does — is real enough, but only materializes after the period for serving Does has expired.

It is the second possibility — "unequivocal abandonment" — that is the most troublesome, however. In a footnote, the court explains that "[u]nequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." Majority op. at 606 n. 5 (citation omitted). The court's restrictive approach is difficult to reconcile with statutory language which provides that a case may be removed within 30 days after the defendant receives "a copy of an amended pleading, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." This language, I

submit, covers a wide variety of situations, not just the two enumerated in footnote 5 of the court's opinion. Consider the following:

> Plaintiff writes defendant a letter advising him that he is abandoning the unserved Doe defendants. Defendant writes back requesting that plaintiff formally amend the complaint to drop the Does but plaintiff refuses to do so. This situation clearly seems to fit the statutory language as an event triggering the right to remove, yet, under the court's new rule, this would not be considered "unequivocal abandonment."
>
> Defendant propounds requests for admission asking plaintiff to admit that there are no unknown parties left unserved. Plaintiff does not deny. Ditto.
>
> Plaintiff files an at-issue memorandum containing the following certification: "Plaintiff is aware of no unserved parties that will be brought in the case and abandons its claims against any parties who have not been served as of this date." Ditto.

These are not wild examples; they, and countless others like them, happen every day. Our district courts and litigants will be required to confront them. The court's opinion will no doubt create a serious dilemma to those seeking to apply its teachings. On the one hand, the opinion speaks with the authority of the full court, and its rulings must be taken very seriously. On the other hand, this aspect of its ruling is so obviously dicta, and so obviously fails to follow the clear statutory language, that courts and litigants may well be tempted to shrug it off as not really meaning what it says. While defiance of binding authority is never appropriate, blindly following dicta also has its hazards.

That the court must resort to dicta to make its rule workable should be a further indication that its rule may be flawed. The difficulty, as I see it, is that the court is the captive of precedent that it is authorized to overrule but fails to reconsider. Specifically, the court fails to consider the fundamental question of the proper status of Doe defendants when a case is removed to federal court. I attempt to do so below.

II.

There are two diametrically opposed models of how Doe defendants should be viewed by the federal courts. On the one hand, they could be treated like real parties — actual flesh and blood people — whose names happen to be unknown. On the other hand, Does could be viewed as procedural fictions, magic words used by lawyers in pleadings for the sole purpose of tolling the statute of limitations against parties that might conceivably turn up. While there may be a small number of cases falling into the former category, the vast majority of Does that populate the state courts of California are of the latter type. Doe allegations, of which those here are typical,[14]

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[14]Paragraphs 1 and 2 of the complaint containing what I believe are fairly standard Doe allegations provide as follows:

> 1. The true names and/or capacities, whether individual, corporate, associate or otherwise of defendants, DOES 1 through 50, inclusive, and each of them, are unknown to plaintiff who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and upon such information and belief alleges, that each of the defendants fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to and proximately caused the injuries and damages to plaintiff as hereinafter alleged. The plaintiff will seek leave of Court to amend this Complaint to insert the true names and/or

generally do not represent real people, diverse or otherwise. They should not, therefore, automatically be treated as if they do. That decision should be made on the basis of whether to do so is consistent with the Federal Rules of Civil Procedure and other relevant federal interests, including the unimpaired operation of the federal removal statute.

The Federal Rules of Civil Procedure do not provide for suing fictitious parties. Indeed, the practice is inconsistent with many of the rules and incompatible with federal procedure. *See, e.g.,* Fed.R.Civ.P. 10(a) ("[i]n the complaint the title of the action shall include the names of all the parties . . . ."); pp. 617-618 *infra.* We have repeatedly held that a suit naming Doe defendants may not be maintained in federal court. *See, e.g., Fifty Assocs. v. Prudential Ins. Co. of Am.,* 446 F.2d 1187, 1191 (9th Cir.1970); *Craig v. United States,* 413 F.2d 854, 856 (9th Cir.), *cert. denied,* 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 451 (1969); *Molnar v. National Broadcasting Co.,* 231 F.2d 684, 686-87 (9th Cir.1956). Nevertheless, in a more recent case, we held that a plaintiff is entitled to the benefit of the California Doe pleading practice when his case is removed to federal court. *Lindley,* 780 F.2d 797.

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capacities of such fictitiously named defendants when the same have been ascertained.

2. Plaintiff is informed and believes, and thereupon alleges, that at all times mentioned herein, defendants, and each of them, including DOES 1 through 50, inclusive, and each of them, were the agents, servants, employees and/or joint venturers of their codefendants, and were, as such, acting within the course, scope and authority of said agency, employment and/or venture and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, employee and/or joint venturer.

This is a critical assumption. If plaintiffs may, as a matter of right, substitute the names of real people for the Does, then the Does must be treated as real people for purposes of determining diversity of citizenship, for they may well become real at the plaintiff's option. But, it seems to me, Doe defendants are more readily treated as nullities for purposes of federal practice, seeing as they are not authorized or contemplated by our Federal Rules of Civil Procedure. If that were the case, the problems with which we have been grappling would disappear; the court could look only at the named parties for purposes of determining diversity at the time of removal; additional parties could be added later under the Federal Rules, just as in any other diversity case brought in district court.[15] While the court does not discuss *Lindley,* the *Lindley* opinion plainly is the predicate for its ruling today.[16] It becomes crucial, therefor, to consider whether *Lindley* was correctly decided.

California's Doe pleading practice addresses a specific issue that arises during the course of litigation: How does the filing of the lawsuit affect the running of the statute of limitations as to potential defendants whose identity is unknown at the time suit is brought? The California rule is that, for three years after filing, the plaintiff may

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[15]The fact that parties that could destroy diversity may be added has never been a bar to removal. *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182, 189, 44 S.Ct. 266, 267, 68 L.Ed. 628 (1924) ("[t]he right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed").

[16]Judge Schwarzer certainly thought so in crafting the *CTS Printex* rule. He opened the oral argument on the motion for remand by citing *Lindley* and asking the lawyers to comment "if you aren't totally shellshocked by this bombshell . . . ." RT at 3. He then made it clear that he considered *Lindley* to be the premise of the rule he announced in his opinion. *See* p. 604 n. 2 *supra.*

amend the complaint by adding such parties as a matter of right. Cal.Civ.Proc.Code §§ 474, 583.210 (West 1979 & Supp.1987). In federal court, the same problem is addressed and resolved by Fed.R.Civ.P. 15(c). Under the Federal Rule, an amendment to the complaint adding a party relates back to the date of the original pleading only if, *inter alia,* the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him.

When a diversity case is initially filed in federal court, Rule 15(c) clearly supersedes state law on relation back. *See, e.g., Santana v. Holiday Inns, Inc.* 686 F.2d 736, 738-39 (9th Cir.1982); *Britt v. Arvanitis,* 590 F.2d 57, 61-62 (3d Cir.1978). However, *Lindley* holds that when the case is first filed in state court and then removed, the Doe pleading rule is imported into the case as a matter of state substantive law, trumping Rule 15(c). 780 F.2d at 800-01.

The *Lindley* approach is foreclosed by the Supreme Court's decision in *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). *Hanna* addressed the question of what happens when there is a conflict between the Federal Rules and state law, the Federal Rule takes precedence unless, of course, the Federal Rule is invalid. The following passage from *Hanna* could not be clearer on this point:

> It is true that both the [Federal Rules] Enabling Act [28 U.S.C. § 2072] and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical . For they were designed to control very different sorts of decisions. *When a situation is covered by one of the Federal Rules,*

> *the question facing the court is a far cry from the typical, relatively unguided* Erie *choise: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.*

380 U.S. at 471, 85 S.Ct. at 1144 (emphasis added; footnote omitted). *See generally 3* J. Moore, *Moore's Federal Practice* ¶ 15.15[2], at 15-142 (2d ed. 1987) (*"Hanna v. Plumer* is dispositive of the issue and . . . the matter is . . . one solely of federal practice under Rule 15(c)") (footnote omitted).

Earlier this year, the Supreme Court unanimously reaffirmed the vitality of *Hanna* and further explained its scope and rationale. *See Burlington Northern R.R. v. Woods,* — U.S. — , 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). *Burlington Northern* dealt with an Alabama statute requiring that a 10 percent penalty be assessed against an unsuccessful appellant who had obtained a stay of the judgment pending appeal. The appellee in a federal diversity case removed from state court claimed the benefit of this rule, arguing that he was entitled to it as a matter of substantive state law. Speaking for the Court, Justice Marshall held that the applciation of the Alabama statute was foreclosed under *Hanna* by Federal Rule of Appellate Procedure 38, which provided that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

The Court first noted that "[t]he cardinal purpose of Congress in authorizing the development if a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect

litigants' substantive rights do not violate [the Rules Enabling Act's requirement that the rule not abridge, enlarge or modify a substantive right] *if reasonably necessary to maintain the integrity of that system of rules."* 107 S.Ct. at 970 (emphasis added). The Court then noted that Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purpose of the Alabama statute to indicate that *the Rule occupies the [state] statute's field of operation so as to preclude its application in federal diversity actions." Id.* at 970-71 (emphasis added).[17] The Court rejected the argu-

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[17]In an important footnote, the Court also found the Alabama statute inconsistent with the operation of several of the other federal rules, specifically those dealing with prejudgement interest and stays pending appeal:

> Rule 37 of the Federal Rules of Appellate Procedure provides further indication that the Rules occupy the Alabama statute's field of operation so as to preclude its application in diversity actions. Since the affirmance penalty only applies if a trial court's judgment is stayed pending appeal, see Ala.Code § 12-22-72 (1986), it operates to compensate a victorious appellee for the lost use of the judgement proceeds during the period of appeal. Federal Rule 37, however, already serves this purpose by providing for an award of postjudgment interest following an unsuccessful appeal. See also 28 U.S.C. § 1961.
>
> In addition, we note that federal provisions governing the availability of a stay of judgment pending appeal do not condition the procurement of a stay on exposure to payment of any additional damages in the event the appeal is unsuccessful and, unlike the state provision in this case, allow the federal courts to set the amount of security in their discretion. Compare Fed.Rules Civ.Proc. 62(d) and 62(g) and Fed.Rule App.Proc. 8(b) with Ala.Rule App.Proc. 8(b). See also 28 U.S.C. § 1651.

107 S.Ct. at 971 n. 5.

ment that the state and Federal Rules were not truly in conflict because "a federal court sitting in diversity could impose the mandatory penalty and likewise remain free to exercise its discretionary authority under Federal Rule 38." *Id.* at 971. The Court stated:

> This argument . . . ignores the significant possibility that a Court of Appeals may, in any given case, find a limited justification for imposing penalties in an amount *less than* 10% of the lower court's judgement. Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals; the Alabama statute precludes any exercise of discretion within its scope of operation.

Id. (emphasis original).

Burlington Northern puts an important gloss on *Hanna.* It stands for the proposition that there may be a conflict between the Federal Rules and state law even if there is no direct contradiction. The relevant questions are whether the Federal Rule "is reasonably necessary to maintain the integrity of [the federal] system of rules," and whether it "occupies the [state] statute's field of operation." *Id.* at 970.

Under this standard, it is clear that California's Doe pleading practice is supplanted by the Federal Rules of Civil Procedure once the case is removed to federal court. *Lindley's* contrary conclusion, 780 F.2d at 800-01, reached without the benefit of the Supreme Court's discussion in *Burlington,* is no longer plausible. We not only have direct conflicts between the operation of the state statute and the Federal Rules, *see* pp. 617-618 *infra,* we also have serious disruptions of federal procedures and, as of today, a wholesale subservience to state law of an Act of Congress dating back to the earliest days of the Republic.

Compared to this, the conflict between state and federal law in *Burlington Northern* seems like a trifle.

The conflict between state and federal procedure in this case is clear. California's Doe pleading rule has two components. First, Cal.Civ.Proc.Code § 474 provides that a defendant may be designated by a fictitious name; the real name may be substituted whenever the true identity is discovered. Next, Cal.Civ.Proc.Code § 583.210 provides that a plaintiff has up to three years after filing to serve the summons and complaint on any defendant. California courts have interpreted this to extend the time available to replace Doe defendants with named parties. *Lesko v. Superior Court,* 127 Cal.App.3d 476, 481-82, 179 Cal.Rptr. 595, 598 (1982). The analogous Federal Rules are Fed.R.Civ.P. 4(j), 15(c), 19, 20 and 21.

Rule 4(j) provides that the defendant must be served within *120 days* of the filing of the complaint; absent good cause, failure to serve within this time renders the complaint subject to dismissal. This provision cannot be reconciled with Cal.Civ.Proc.Code § 583.210, which allows three years for service.[18]

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[18]In *Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the Supreme Court considered the relationship between Fed. R.Civ.P. 4(j)'s time-to-serve rule and a state statute of limitations. Rejecting the dissent's contrary argument, the Court held that the time allotted by Rule 4(j) to serve the complaint does *not* extend the substantive statute of limitations. *Compare id.,* 106 S.Ct. at 2385 (majority opinion) *with id.* at 2388 (Stevens, J., dissenting). *Schiavone* strongly suggests that a provision allowing a specific time for service is not the equivalent of a statute of limitations for purposes of federal law. California courts agree. *See, e.g., Atchison, T. & S.F. Ry. v. Rollaway Window Screen Co.,* 101 Cal.App.2d 763, 765-66, 226 P.2d 763, 765 (1951); *Rio Del Mar Country Club v. Superior Court,* 84 Cal.App.2d 214, 220, 190 P.2d 295, 300 (1948) ("[i]t has been

Rules 19, 20 and 21 prescribe when new parties may or must be added to complaints filed in federal court. The rules are comprehensive and give the district court broad authority to accept or reject new parties. By contrast, Cal.Civ.Proc.Code § 474 has no restrictions whatsoever; the court has no discretion; the plaintiff can bring in newly-identified parties at will. The Federal Rules and California statutes thus address exactly the same problem and resolve it in different ways, clearly occupying the same "field of operation."

Finally, Federal Rule 15(c) determines the extent to which parties added by amendment are subject to the complaint's original filing date. Under the Federal Rule, an amendment to the complaint adding a party related back to the date of the original complaint only if, *inter alia,* the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him. The state rule requires no such notice to the new party; the amendment relates back in all cases. Here again, the Federal Rules and state law reach inconsistent solutions to the same problem.

When federal law and state law address precisely the same issues and resolve them in different and inconsistent ways, the state statute would seem to be clearly preempted under the Supreme Court's analysis in *Burlington Northern. Lindley,* however, rejects this conclusion. 780 F.2d at 800-01. Not surprisingly, this leads to a variety of anomalies. Perhaps the most serious of these is that if — as *Lindley* holds — Doe pleadings must be permitted in federal court, this must surely apply to *all* diversity cases, not merely those initiated in state court

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expressly held that § 581(a) is not a statute of limitations"); *Gonsalves v. Bank of Am.,* 16 Cal.2d 169, 172, 105 P.2d 118, 120 (1940).

and then removed to federal district court. Fed.R. Civ.P. 4(j) then would become inapplicable to all California diversity cases, plaintiffs in all such cases having three years, not 120 days, to serve the complaint.

Similarly, if *Lindley* has identified a rule of substantive state law that we must apply under *Erie,* all California diversity plaintiffs, not merely those where the case is removed from state court, should be entitled to file a complaint in federal court naming Doe defendants, and have an absolute right to bring in real parties within three years, regardless of whether they would otherwise be permitted to do so under Fed.R.Civ.P. 19, 20 and 21. Circuit authority is squarely to the contrary. In *Molnar,* 231 F.2d at 686-87, we held that a district court diversity complaint containing Doe allegations is subject to dismissal. *Accord Fifty Assocs.,* 446 F.2d at 1191. Based on these decisions, the local rules of at least three of our district courts prohibit Doe pleadings. D.Ariz.R. 10(d); C.D.Cal.R. 3.7.2.1; S.D.Cal.R. 200-6. If *Lindley*'s rationale is accepted, it overrules *Molnar* and *Fifty Associates,* and invalidates these local rules.

Lindley creates yet another conflict with one of our cases interpreting the Federal Rules. *Santana,* 686 F.2d 736, considered whether Rule 15(c) could be applied in a diversity case to extend the state statute of limitations where state law had no equivalent relation-back doctrine. Analyzing the situation under *Hanna,* we held in *Santana* that the Federal Rule trumped state law: "We conclude that *Hanna* commands application of Rule 15(c) in the face of a contrary state rule, and is thus applicable in the present case." *Id.* at 740.

Lindley attempts to distinguish *Santana* by arguing that Rule 15(c) trumps state law when it extends the state statute of limitations but not when it shortens it.

780 F.2d at 801. This takes an incongruous view of state law. Statutes of limitations provide rights for plaintiffs (to bring suit within a specified time) and for defendants (repose after that time runs). *Lindley* and *Santana* can only be reconciled under the theory that plaintiffs' state law rights are more important than those of defendants. The Federal Rules embody no such onesided principle. It seems to me that either *Santana* is right or *Lindley* is, but not both.

Finally, we ought not overlook the confusion Doe pleadings have caused in the district courts, confusion so severe that we convened an en banc panel to deal with the problem. It is also relevant that the en banc panel is so troubled by the problem that it has adopted a mechanical rule that will have a major impact on the operation of the removal statute, a statute that has reflected congressional policy going back to the first judiciary act. Before taking this step, it is worth considering an alternative.

Overrruling *Lindley* would do much to resolve the confusion in this area of the law. If a plaintiff imports with him no right to substitute real parties for fictitious ones in federal court, the fictitious defendants have no meaning and can be disregarded in determining diversity of citizenship.[19] If and when new parties are later discov-

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[19]It is important to distinguish suing fictitious parties from real parties sued under a fictitious name. There may be times when, for one reason or another, the plaintiff is unwilling or unable to use a party's real name. *See, e.g., Roe v. Wade*, 401 U.S. 113, 120 n. 4, 93 S.Ct. 705, 710 n. 4, 35 L.Ed.2d 147 (1973). Also, one may be able to describe an individual (e.g., the driver of the automobile) without stating his name precisely or correctly. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347, 83 L.Ed. 334 (1939). Providing the name for an otherwise identified party would not raise any of the problems associated with substituting a real party for a fictitious one.

ered, they may be added in accordance with the Federal Rules of Civil Procedure. For the great majority of cases, where all the parties are known and the Does are procedural fictions, exclusion of the Does from the federal litigation would have no effect whatsoever.

This resolution of the problem has the benefit of both simplicity and completeness. It would eliminate *all* the problems associated with the addition of Doe defendants, not just some of them. It would not matter whether the Doe allegations were specific or general; nor would a defendant have to guess whether a particular statement or pleading by the plaintiff constitutes an abandonment or waiver of his right to pursue Does, triggering the right to removal. Moreover, the decision as to removal under this rule would be made when Congress intended: very early in the litigation, before the case had an opportunity to grow roots on the state court's docket. Finally, it would make removals consistent nationwide and avoid giving states and litigants the power to manipulate the timing of federal removals. *See* p. 613 n. 13 *supra*.

This approach would not necessarily deny plaintiffs the right to pursue unknown parties as they are permitted by state law. In the first place, the Federal Rules contain liberal joinder provision and in many cases — probably most cases — a plaintiff may be able to join a newly discovered party after the litigation has begun. In any event, the rule would only apply to the federal courts. It does not, and cannot, speak to what rights the plaintiffs may have under state law. That, it seems to me, is a problem for the state courts and the state legislaltures to work out. Finally, if, in individual cases, the district court is concerned that application of the federal rule will work undue hardship on a plaintiff, it can remand the Doe

allegations and allow the plaintiff to pursue the case against the Does in state court.

Conclusion

The court continues to take the law of removal in the wrong direction. Convened to solve a problem, the court only exacerbates it. While the rule it adopts may initially lessen somewhat the burdens on the district courts, it surely will not solve all the problems and may create many more. And it may well be a false economy; duplication of effort resulting from late removals may create as much work as it saves. Moreover, the court's rule sacrifices, unnecessarily I submit, important federal rights. While the decision may please those unsympathetic to diversity jurisdiction it is inconsistent with the law as Congress has written it. I respectfully, but firmly, dissent.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY BRYANT,
Plaintiff,

v.

FORD MOTOR COMPANY, a corporation,
Defendant.

No. 84 2049 PAR (Mcx)

JUDGMENT

The motion of defendant Ford Motor Company ("Ford") for summary judgment and summary adjudication of issues came on for hearing on August 20, 1984, before the Honorable Pamela A. Rymer, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered.

IT IS HEREBY ORDERED AND AJUDGED that:

1. The plaintiff's negligence claim as alleged in the first cause of action in the complaint herein shall be dismissed as a matter of law.

2. The plaintiff's breach of warranty claim as alleged in the second cause of action in the complaint herein shall be dismissed as a matter of law.

3. The plaintiff's strict liability claim as alleged in the third cause of action in the complaint herein shall be dismissed as a matter of law.

4. Ford is entitled to summary adjudication of the issues and dismissal of the first, second and third causes of action.

Dismissal of these causes of action shall be entered accordingly.

Dated: August 21, 1984.

/s/ PAMELA ANN RYMER

Pamela A. Rymer
United States District Judge

APPENDIX C

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1)

Oy Ford Ab
Ford Motor Company Aktiebolag
Eveleth Taconite Company
Renaissance Center Partnership
Fairlane Woods Associates (A Partnership)
Park Ridge Corporation
Ford Motor Company Limited
Ford Motor Credit Company Limited
Henry Ford & Son (Finance) Limited
Ford-Werke AG
Ford Credit Bank AG
Ford Motor Company of Canada, Limited
Ensite Limited
Ford Motor Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford France S.A.
Ford Motor Company (Belgium) N.V.
Ford Credit N.V.
Ford Italiana S.p.A.
Ford Credit S.p.A.
Ford Leasing S.p.A.
Ford Motor Company A/S
Ford Credit A/S
Ford Motor Company S.A. de C.V.
Ford Nederland B.V.
Ford Credit B.V.
Ford Leasing S.A.
Ford Credit S.A.
Transcon Insurance Limited
Ford Lio Ho Motor Company, Ltd.

Bayou City Ford Truck Sales
Beltway Ford Truck Sales
Bi-State Ford Truck Sales
Bridge-Haven Ford Truck Sales
Central Ford Truck Sales
Coastal Ford Truck Sales
Crossroads Ford Truck Sales
Deacon Ford Truck Sales
Freeway Ford Truck Sales
Keystone Ford Truck Sales
Lakeland Ford Truck Sales
Liberty Ford Truck Sales
Mid-America Ford Truck Sales
Mid-Cal Ford Truck Sales
Mid-States Ford Truck Sales
Miramar Ford Truck Sales
Mission Valley Ford Truck Sales
Motor City Ford Truck, Inc.
Northside Ford Truck Sales
River City Ford Truck Sales
Sacramento Valley Ford Truck Sales
Shamrock Ford Truck Sales
Sooner State Ford Truck Sales
Southside Ford Truck Sales
Trans-West Ford Truck Sales
West Gate Ford Truck Sales
Delta Truck Lease, Inc.

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth below:

Dealer	City	State
Airport Lincoln-Mercury Sales	Coraopoli	PA
Albion Ford-Mercury, Inc.	Albion	MI
Allegan Ford-Mercury Sales, Inc.	Allegan	MI
Alpena Ford Lincoln-Mercury, Inc.	Alpena	MI
Altoona Ford, Inc.	Altoona	PA
Auburn Ford Lincoln-Mercury, Inc.	Auburn	AL
Aurora Lincoln-Mercury, Inc.	Aurora	CO
Avalon Lincoln-Mercury, Inc.	Carson	CA
Baranco Lincoln-Mercury, Inc.	Duluth	GA
Beloit Ford Lincoln-Mercury, Inc.	South Del	IL
Berens Lincoln-Mercury, Inc.	Chicago	IL
Buffalo Ford-Mercury, Inc.	Buffalo	MN
C & L Lincoln-Mercury, Inc.	Effingham	IL
Campus Ford, Inc.	Okemos	MI
Centralia Ford-Mercury, Inc.	Centralia	WA
Champion Ford Sales, Inc.	Niles	IL
Clinton Ford Lincoln-Mercury, Inc.	Clinton	MO
Coastal Ford, Inc.	Mobile	AL
Columbus Ford-Mercury, Inc.	Columbus	KS
Conway Ford, Inc.	Conway	SC
Copper Country Ford Lincoln-Mercury, Inc.	Houghton	MI
Cornelia Ford Lincoln-Mercury, Inc.	Cornelia	GA
County Ford, Inc.	Jennings	MO
Courtesy Ford Lincoln-Mercury, Inc.	Danville	IL
Crossroads Ford-Mercury, Inc.	Jesup	GA
Crown Lincoln-Mercury, Inc.	Sioux City	IA
Del Perry Ford, Inc.	West Memphis	AR
Delaware Ford, Lincoln-Mercury, Inc.	Delaware	OH
Delta Ford Sales, Inc.	Vicksburg	MS
Duryea Ford, Inc.	Brockport	NY
Dyersburg Ford Lincoln-Mercury, Inc.	Dyersburg	TN
Edgar Ford, Inc.	Breaux Br	LA
El Dorado Ford Lincoln-Mercury, Inc.	El Dorado	AR

Dealer	City	State
Empire Ford, Inc.	Spokane	WA
Fort Valley Ford, Inc.	Fort Valley	GA
Francis Scott Key Lincoln-Mercury Inc.	Frederick	MO
Freedom Ford Sales, Inc.	South Gate	CA
Frontier Lincoln-Mercury, Inc.	Depew	NY
Ft. Walton Beach Lincoln-Mercury, Inc.	Ft. Walton	FL
Geneva Ford Sales, Inc.	Geneva	NY
Gold Star Ford Lincoln-Mercury, Inc.	Shenandoah	PA
Green River Ford-Mercury, Inc.	Campbells	KY
Harbor Lincoln-Mercury, Inc.	Lorain	OH
Heritage Ford-Mercury, Inc.	Corydon	IN
Heritage Lincoln-Mercury, Inc.	Columbus	MS
Highland Lincoln-Mercury, Inc.	Highland	IN
Hilltop Ford, Inc.	Denison	TX
Hub City Ford-Mercury, Inc.	Crestview	FL
Illini Lincoln-Mercury Sales, Inc.	Champaign	IL
Independence Ford, Inc.	Clio	MI
Jim Warren Ford-Mercury, Inc.	Monmouth	IL
Lakeland Ford Lincoln-Mercury, Inc.	Herrin	IL
Leader Ford, Inc.	St. Louis	MO
Liberty Ford Lincoln-Mercury, Inc.	Centralia	IL
Lompoc Ford, Inc.	Lompoc	CA
Los Banos Ford Lincoln-Mercury, Inc.	Los Banos	CA
Madison Ford Mercury, Inc.	Rexburg	ID
Manhattan Ford Lincoln-Mercury, Inc.	New York	NY
Marion Lincoln-Mercury, Inc.	Marion	IN
McGehee Auto Plaza, Inc.	McGehee	AR
Miramar Lincoln-Mercury, Inc.	San Diego	CA
Monticello Ford Lincoln-Mercury, Inc.	Monticello	NY
Natchitoches Ford Sales, Inc.	Natchitoches	LA
New Castle Ford Lincoln-Mercury, Inc.	New Castle	IN
Noble Ford Lincoln-Mercury West, Inc.	Earlham	IA
Norris Lake Ford Lincoln-Mercury, Inc.	Lafollett	TN
North Alabama Ford-Lincoln-Mercury, Inc.	Athens	AL
Northampton Ford, Inc.	Northampton	MA
Odessa Ford Mercury, Inc.	Odessa	DE
Olympic Ford of Marysville, Inc.	Arlington	WA

Dealer	City	State
Ottawa Ford Lincoln-Mercury, Inc.	Ottawa	IL
Park Ford Sales, Inc.	Iowa Park	TX
Pasadena Lincoln-Mercury, Inc.	Pasadena	CA
Perry Lincoln-Mercury-Merkur, Inc.	Montgomery	AL
Plainfield Lincoln-Mercury, Inc.	Grand Rapids	MI
Robert Woodson Lincoln-Mercury	Wichita Falls	TX
Rochester Lincoln-Mercury, Inc.	Rochester	MN
Royal Lincoln-Mercury Sales, Inc.	Peoria	IL
Royal Ford Lincoln-Mercury, Inc.	West Bend	WI
Shoals Ford, Inc.	Muscle Shoals	AL
Sonoma Ford, Inc., DBA Sonoma	Sonoma	CA
Suburban Ford Lincoln-Mercury, Inc.	El Reno	OK
Sumter Ford Lincoln-Mercury, Inc	Americus	GA
Sunbelt Ford-Mercury, Inc.	Quincy	FL
Sunrise Ford Lincoln-Mercury, Inc.	Ashtabula	OH
Tower Ford Mercury, Inc.	Fulton	MO
Town & Country Lincoln-Mercury, Inc.	Brunswick	OH
Tropical Ford, Inc.	Orlando	FL
Tuskegee Ford-Mercury, Inc.	Tuskegee	AL
Union City-Ford Lincoln-Mercury, Inc.	Union City	TN
Universal Ford Sales, Inc.	Crosby	TX
University Ford of Peoria, Inc.	Peoria	IL
Verde Valley Ford Lincoln-Mercury, Inc.	Cottonwood	AZ
Victory Ford, Inc.	Morgantown	WV
Wauseon Ford, Inc.	Wauseon	OH
Waynesboro Sales & Service, Inc.	Waynesboro	VA
West Covina Lincoln-Mercury, Inc.	West Covina	CA
West Suburban Ford, Inc.	West Des Moines	IA
Western Ford Mercury, Inc.	Clyde	OH
Westwood Ford Lincoln-Mercury, Inc.	Fort Dodo	IA

APPENDIX D

28 U.S.C. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States; . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed

and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction . . .

28 U.S.C. § 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be deter-

mined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of the civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded. . . .

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Cal. Civ. Proc. Code § 474

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 14, 1988, I served the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in re: "Ford Motor Company vs. Gary Bryant" in the United States Supreme Court, October Term, 1988, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Charles B. O'Reilly, Esquire
Michael L. Goldberg, Esquire
Greene, O'Reilly, Broillet, Paul,
Simon, McMillan, Wheeler & Rosenberg
816 South Figueroa Street
Los Angeles, California 90017

All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on July 14, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA